UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE ENRON CORPORATION SECURITIES LITIGATION	)	No. H-01-3624
	)	Hon. Melinda Harmon
MARK NEWBY, et al., Plaintiffs,	)	(consolidated with H-01-3624)
v.	)	
ENRON CORP., et al., Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE CONSOLIDATED COMPLAINT BY DEFENDANTS ANDERSEN-UNITED KINGDOM AND ANDERSEN-BRAZIL

Defendants Andersen-United Kingdom and Andersen-Brazil,[1] by their attorneys, respectfully submit this reply memorandum in support of their motion to dismiss the Consolidated Complaint ("the Complaint").

ARGUMENT

In their opening brief, Andersen-United Kingdom and Andersen-Brazil demonstrated that plaintiffs failed to effect proper service of process and that this Court lacks personal jurisdiction over them. Plaintiffs' response brief does nothing to dispel these notions. First, plaintiffs assert that they have satisfied service of process as to Andersen-United Kingdom and Andersen-Brazil by dropping off copies of their Complaint with an executive assistant at Arthur Andersen LLP

[1] For ease of convenience, this Motion refers to Andersen-Brazil, the name used in Plaintiffs' Complaint. The actual entity is Arthur Andersen S/C, a partnership formed pursuant to Brazilian law. It is incorrectly named as Andersen Brazil.

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and Andersen-Brazil by dropping off copies of their Complaint with an executive assistant at Arthur Andersen LLP ("Andersen LLP"), a firm based in the United States. But plaintiffs cannot demonstrate, as they must, that such a person is authorized to accept service on behalf of foreign entities who do not employ her, and plaintiffs concede that they have not even attempted to meet additional and independent requirements imposed by international law. Second, plaintiffs cannot demonstrate that this Court has personal jurisdiction over these foreign entities because they have failed to allege that either defendant directly participated in any activity in Texas, much less the United States. For these reasons, this Court should dismiss the Complaint against Andersen-United Kingdom and Andersen-Brazil.

I. Andersen-United Kingdom and Andersen-Brazil Were Not Properly Served With the Complaint.

Plaintiffs have failed to effect proper service on Andersen-United Kingdom or Andersen-Brazil. This failure is no mere technical defect: "the summons continues to function as the *sine qua non* directing an individual or entity to participate in a civil action. . . ." *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351 (1999). Without the service of the summons, these defendants are not parties to the instant action. "[O]ne becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend." *Id.* at 350. Plaintiffs' position that service on Andersen-United Kingdom and Andersen-Brazil was perfected by dropping off copies at Andersen LLP in Chicago, Illinois, does not even approach the requirements for service under the Federal Rules of Civil Procedure. This action therefore should be dismissed pursuant to Rule 12(b)(5). *See Rhodes v. J.P. Sauer & Son*, 98 F. Supp.2d 746, 748 (W.D. La 2000) ("In order to achieve proper service of process for purposes of Rule 12(b)(5), a party must follow the requirements of Rule 4. . . .").

Plaintiffs' claim that service was effected upon Andersen-United Kingdom and Andersen-Brazil because Carol Gadbois accepted service on their behalf. But Ms. Gadbois is identified in the summons as an executive assistant, and she was purportedly served at the Chicago offices of Andersen LLP. She is alleged to be neither an officer of nor an agent authorized by either Andersen-United Kingdom or Andersen-Brazil to accept service on their behalf. Her complete lack of any connection to Andersen-United Kingdom or Andersen-Brazil makes it impossible for service upon her to conform with the Rule 4(h)(1) requirements for service upon corporations.

Even assuming *arguendo* that Andersen LLP received process through Ms. Gadbois, service is still defective upon Andersen-United Kingdom and Andersen-Brazil because neither entity exerts (or is even alleged to exert) the type of control over Andersen LLP required by the courts in order to conclude that service upon one entity was completed through service of the other. "[T]he mere fact that a corporate relationship exists is not sufficient evidence to warrant the assertion of jurisdiction over a related corporate entity." *Dickson Marine, Inc. v. Panalpina, Inc.*, 179 F.3d 331, 340 (5th Cir. 1999). "The degree of control exercised by the parent must be greater than that normally associated with common ownership and directorship. The degree of control exercised by the parent must be 'more than that appropriate for a sole shareholder of a corporation'. . . . The parent may have complete authority over general policy decisions at the subsidiary, including such matters as selection of product lines, hiring and firing of officers, and approval of sizeable capital investments, without being considered to exercise domination of the company." *Dunn v. A/S Em. Z. Svitzer*, 885 F. Supp. 980, 988 (S.D. Tex. 1995) (citations omitted); *see also Allan v. Brown & Root, Inc.*, 491 F. Supp. 398, 403 (S.D. Tex. 1980) (where foreign subsidiary did not exert total control over the local parent, service upon the subsidiary could not be made through parent) ("[T]he relationship of a parent corporation and a subsidiary

corporation is not of itself a sufficient basis for subjecting a foreign corporation to domestic jurisdiction, nor does such a relationship create the necessary agency for making service on one through the other.").[2]

The challenge of sufficiency of process by Andersen-United Kingdom and Andersen-Brazil shifts the burden to plaintiffs to show adequacy of service. *Howard v. Klynveld Peat Marwick Goerdeler,* 977 F. Supp. 654, 657 (S.D.N.Y. 1997). Plaintiffs have failed in every respect to achieve such service. Even apart from the insufficiency of plaintiffs' attempts with respect to Ms. Gadbois, they have not even attempted to meet the requirements of international law – requirements that Andersen-United Kingdom and Andersen-Brazil pointed out in their opening brief. (Def. Br. at 3 n.1.) Plaintiffs' only answer to this failure is to admit that they have not complied with international law coupled with an offer to "go through any steps this Court requests" or to "serve according to the international laws" if ordered to do so. (Pl. Br. at 2 n.1.) A willingness to attempt service is no substitute for having effected service. As plaintiffs' naked conclusions that service has been or will be completed grossly falls short of their Rule 4 service obligations, dismissal is warranted pursuant to Rule 12(b)(5).

II. This Court Lacks Personal Jurisdiction Over Andersen-United Kingdom and Andersen-Brazil.

Plaintiffs' claims also fail because this Court lacks personal jurisdiction over Andersen-United Kingdom and Andersen-Brazil. Plaintiffs assert that this Court may exercise personal jurisdiction over Andersen-United Kingdom and Andersen-Brazil (1) because of their alleged

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[2] Plaintiffs' discussion of personal jurisdiction has no bearing upon this issue of proper service. "[A] determination of whether 'sufficient contacts' exist for this court to exercise jurisdiction is unnecessary because the issue of validity of service is not one of Constitutional due process, but rather one of compliance with the Federal Rules of Civil Procedure. Therefore, plaintiffs' arguments as to defendants' contacts with this state are academic and do not apply for the purposes of the instant [12(b)(5)] motion." *Atuahene v. Sears Mortgage Corp.*, 2000 WL 134326 at *6 (E.D. Pa. Feb. 4, 2000) (citations omitted).

involvement in the alleged fraudulent scheme, and (2) because their alleged conduct was designed to harm plaintiffs in the United States.[3] (Pl. Br. at 5.) Though plaintiffs present these as if they were two separate bases of jurisdiction, they are, in fact, the same. Put simply, plaintiffs claim Andersen-United Kingdom and Andersen-Brazil participated in an allegedly fraudulent scheme that was designed to produce harm in the United States. As a legal matter, it is true that a court may assert personal jurisdiction over a defendant if that defendant has engaged in alleged misconduct "expressly aimed" at the forum jurisdiction. *Calder v. Jones*, 465 U.S. 783, 789-90 (1984). But plaintiffs' factual allegations fall far short of those necessary to overcome a federal court's appropriate caution to assert personal jurisdiction over foreign entities. *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 115 (1987). Plaintiffs have not alleged any misconduct on the part of either Andersen-United Kingdom or Andersen-Brazil. Plaintiffs, instead, have merely alleged that both firms provided services to Enron and its

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[3] Plaintiffs assert that they need establish sufficient contacts with only the United States in general, and not Texas in particular, to justify the exercise of personal jurisdiction in this action brought pursuant to the Securities Act of 1934. (Pl. Br. at 3-4.) Plaintiffs do not even attempt to establish personal jurisdiction based on sufficient contacts with Texas. Thus, if this Court accepts Andersen-United Kindgom's and Andersen-Brazil's argument that Texas is the relevant "forum" for personal jurisdiction purposes (Def. Br. at 6-7), this Court should dismiss those parties from this action for lack of personal jurisdiction.

Likewise, plaintiffs purport to preserve the argument that this Court has general jurisdiction over Andersen-United Kingdom and Andersen-Brazil until it has the opportunity to conduct discovery on that question. (Pl. Br. at 5 n.5.) Plaintiffs' effort to preserve this argument fails because plaintiffs, despite obviously extensive pre-complaint investigation, have failed to allege even one fact that suggests that either Andersen-United Kingdom or Anderson-Brazil have sufficiently systematic and continuous contacts with the United States or Texas to support general jurisdiction. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 415 (1984). Plaintiffs may not sleep on their rights, only to impose the burden of discovery on the defendants without presenting even the faintest of reasons to believe that general jurisdiction exists. *Villar v. Crawley Maritime Corp.*, 990 F.2d 1489, 1501-02 (5th Cir. 1993) (requiring discovery only when plaintiffs' "diligent" efforts present a "non-frivolous" claim of jurisdiction). There is simply no reason to believe general jurisdiction exists, and to grant discovery on this question would condone a burdensome fishing expedition.

subsidiaries. Neither firm is alleged to have engaged in negligent or fraudulent misconduct. As plaintiffs would have it, any entity that provided auditing or accounting services to any Enron-related entity may be sued in this Court. That is not the law.

Plaintiffs claim that both Andersen-United Kingdom and Anderson-Brazil were "involve[d]" and were "participants" in the alleged fraudulent scheme that has allegedly produced harm in the United States. (Pl. Br. at 5, 6.) But a review of plaintiffs' complaint reveals nothing of the sort. Plaintiffs have alleged nothing more than that both Andersen-United Kingdom and Anderson-Brazil were involved or participated "in the 97-00 audits of Enron." (Cmplt. ¶¶ 92(b), (e), (f).) Mere "participation" in an audit is far from having "participated" in an alleged fraudulent scheme connected with an audit. On the face of the Complaint, neither Andersen-United Kingdom nor Andersen-Brazil performed any of its services in an unlawful manner.[4]

The other allegations and admissions regarding both Andersen-United Kingdom and Andersen-Brazil fail to support personal jurisdiction for the same reason. Andersen-United Kingdom and Andersen-Brazil are alleged merely to have provided services in connection with specific projects of entities connected with Enron. (Cmplt. ¶ 897 (Andersen-United Kingdom provided services in connection with Wessex water plant, and Andersen-Brazil provided services in connection with the Cuiaba, Brazil power plant).) There is no allegation regarding the nature of those services, whether they were performed tortiously, and if so, whether the effects of having performed such services were "expressly aimed" at the United States. Finally, both Andersen-United Kingdom and Andersen-Brazil concede that they performed audit services for

[4] Andersen-United Kingdom is alleged to have destroyed "unnecessary documents." The destruction of documents that were "unnecessary" cannot be an allegation of unlawful conduct directed at the United States that would support personal jurisdiction.

certain Enron-related entities. (Anderson-UK Aff. ¶ 12; Anderson-Brazil Aff. ¶ 11.) But, once again, there is no indication that the performance of such services were "expressly aimed" at producing harmful effects in the United States.

Even the cases upon which plaintiffs rely to support their claim for personal jurisdiction demonstrate that their allegations are deficient. In *SEC v. Cook*, No. 301CV481-R, 2001 WL 896923 (N.D. Tex. Aug. 2, 2001), the plaintiff had alleged that the foreign corporation was a "facilitator" of the fraudulent scheme by "solicit[ing] new investors, handl[ing] the dissemination of information to these potential investors, and assist[ing] investors in placing their funds into the scheme." *Id. at* *2. That is, the *Cook* court found personal jurisdiction based on specific allegations that the foreign entity participated *in the scheme* itself, which was designed to produce harmful effects in the United States. Likewise, *Amoco Chemical Co. v. Tex Tin Corp.*, 925 F. Supp. 1192 (S.D. Tex. 1996), involved an allegation that the foreign defendant intended to produce harmful effects in Texas through tortious acts undertaken elsewhere. *Id.* at 1200. There is no allegation that either Andersen-United Kingdom or Andersen-Brazil undertook tortious acts, much less that either intended to produce harmful effects in the United States. This Court, therefore, lacks personal jurisdiction.

CONCLUSION

For the foregoing reasons, Defendants Andersen-United Kingdom and Andersen-Brazil respectfully request that this Court grant its motion to dismiss and enter an order dismissing the Consolidated Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE CONSOLIDATED COMPLAINT BY DEFENDANTS ANDERSEN-UNITED KINGDOM AND ANDERSEN-BRAZIL to all counsel of record on the attached Service List pursuant to the Court Order dated April 10, 2002 on this the 24th day of June, 2002.

Harvey G. Brown, Jr.

The Service List

Attached

to this document

may be viewed at

the

Clerk's Office